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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-

DAVID LEE ZEZOFF,

Petitioner;

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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David Lee Zezoff was indicted on three counts of uttering and publishing checks drawn upon the Treasurer of the United States which contained forged endorsements with intent to defraud the United States in violation of Title 18, U.S.C. §495. Prior to trial, defendant entered a plea of guilty to one Count of the indictment and the other two counts were dismissed at the instance of the United States Attorney. Defendant was committed to

the custody of the Attorney General for a study under 18 U.S.C. §4208(c), at the conclusion of which he was sentenced to a term of three years. At the time of the entry of this sentence, defendant repeatedly stated to the Court that he had been given to understand by his attorney that if he pleaded guilty he would be released after a term of three months. He further contends that his guilty plea was not knowingly and voluntarily made. Defendant appealed from the judgment and sentence and the Court of Appeals affirmed.

OPINION BELOW.

The opinion of the Court of Appeals is as yet unreported, but is reproduced in the Appendix to this Petition. The District Court for the Southern District of Illinois did not file a written opinion.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 17, 1970 (Appendix, A1). No petition for rehearing was filed. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

Whether defendant's plea of guilty was knowingly and voluntarily made.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Code, Title 18:

> "495. Contracts, deeds, and powers of attorney
>
> Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
>
> Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or
>
> Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—
>
> Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

Federal Rules of Criminal Procedure;

"Rule 11. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

STATEMENT OF THE CASE.

This case is a criminal prosecution, charging defendant with three counts of uttering and publishing checks drawn upon the Treasurer of the United States which contained forged endorsements with intent to defraud the United States. (R. 1-3) On his original arraignment, on May 22, 1968, defendant entered a plea of not guilty to each count of the indictment. (R. 50) On February 18, 1969, defendant appeared in Court with his appointed counsel who informed the Court that he wished to change his plea from not guilty as to Count I of the indictment. (R. 55) At this time, the following colloquy occurred:

> "Mr. Runge (U.S. Attorney): . . . I'd like to apprise the Defendant that on each of these counts he faces a possible penalty of $1,000.00 fine and/or ten years in jail, and I understand that Mr. Bodewes had discussed that with him and has also discussed the matter of his guilt with him, Your Honor, but I'll be happy to put into the record what we are prepared to show.
>
> "The Court: Could you do that before we take a plea?
>
> "Mr. Runge: No, Your Honor.
>
> "The Court: All right, the motion to withdraw the plea of not guilty is allowed.
>
> "Mr. Runge: That's as to Count I, Your Honor.
>
> "The Court: That's as to Count I of the indictment. And, is there anything, now, that you desire to do?
>
> "Mr. Bodewes: Yes, he would like to enter a plea as to Count I.

"The Court: Well, now, does he understand—do you understand, Mr. Zezoff, what the penalty is?

"Mr. Zezoff: Yes, sir, I do.

"The Court: Yet, knowing that, you desire to withdraw your plea of not guilty and enter a plea of guilty?

"Mr. Zezoff: Yes, sir.

"The Court: Nobody has compelled you to do that?

"Mr. Zezoff: No, sir.

"The Court: It's done by yourself, freely and voluntarily, without duress from anybody?

"Mr. Zezoff: Yes, sir.

"The Court: You still know you have a right to have this case tried before a petit jury?

"Mr. Zezoff: Yes, sir, I do.

"The Court: Yet you persist in pleading guilty to Count 1 of the indictment?

"Mr. Zezoff: Yes, sir, I do.

"The Court: Having advised you—knowing about your rights, then, I accept your plea of guilty under Count 1 of this indictment. . . .

"The Court: Now, Mr. Zezoff, you're pleading guilty to Count 1 because you are guilty of that, you did cash that check, did you not?

"Mr. Zezoff: Yes, sir." (R. 55-57)

The matter was referred to the Probation Officer for presentence investigation, and Counts 2, and 3 of the indictment were dismissed. (R. 57)

On September 25, 1969, the defendant again appeared before the Court. At this time, defendant's counsel stated that on May 27, 1969, the Court had committed defendant

to the custody of the Attorney General for a study under 18 U.S.C. 4208(c). (R. 61) The Court then noted that it had been recommended that defendant's sentence be reduced to three years under Section 4208(a). (R. 61) At this time, defendant stated several times to the Court that he had been given a different understanding by his attorney, and that he felt that after three months' investigation, he would be released, and that he was not informed of the ten year sentence. (R. 62, 63, 64, 65, 66, 67, 68, 69)

The trial court refused to change the sentence in any way. Defendant filed his notice of appeal on September 27, 1969.

On June 17, 1970, the Court of Appeals affirmed the judgment in all respects.

REASONS FOR GRANTING THE WRIT.

THE COURT OF APPEALS IGNORED THE FAILURE OF THE DISTRICT COURT TO FOLLOW THE REQUIREMENTS OF RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The Court of Appeals based its affirmance upon the conclusion that defendant's guilty plea was voluntarily and knowingly made, with understanding of the nature of the charge. However, nowhere in its opinion does it discuss the matter of whether defendant did in fact have an understanding of the nature of the charge. A reading of the record in this cause fails to disclose that defendant did in fact understand the nature of the charges against him. The District Court did not comply with either the spirit or the commands of Rule 11. To say, as did the Court of Appeals, that *McCarthy* v. *United States*, 394 U.S. 459 (1969), which was decided a month and a half prior to the acceptance of defendant's guilty plea, is not retroactive does not dispose of the fact that the District Court failed to comply with this rule which was in effect at the time. The fact that this Rule had not been declared to have a constitutional foundation at the time defendant's guilty plea was accepted does not excuse the failure to follow its dictates.

The examination of defendant by the District Court at the time his guilty plea was accepted was merely perfunctory and could not have served to demonstrate to the Court whether the plea was in fact voluntarily and knowingly entered into. The colloquy between the Court and defendant at the time the guilty plea was accepted

is a model of what has been condemned as a mere charade on the part of the court. In *Smith* v. *United States*, 360 U.S. 1, 3 (1959) this Court held that the "stilted and formal colloquy consisting of brief and didactic statements by the judge" which were designed to elicit no more than a "yes" or "no" answer from the defendant was particularly inadequate. This is exactly what occurred in this case. There is no way of telling from the record whether the facts which defendant was willing to admit to were sufficient to bring him within the bounds of the criminal statute under which he was charged. All that defendant admitted was that he had cashed a certain check. But, the statute requires more for a conviction. Not only must the accused have uttered or published a false, forged, altered or counterfeited writing, but he must have had the "intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited." 18 U.S.C. §495. There is no indication in the record that the check involved herein was in fact either false, forged, altered, or counterfeited, and there is certainly no indication that the defendant knew it to have been such at the time that he admittedly cashed it. There is absolutely no indication that the court complied with the command of Rule 11 that he should not enter "a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

There is nothing in the record to indicate that the judge inquired into defendant's state of mind at the time the check was cashed or at the time he entered his guilty plea. Was the check actually false, forged, altered or counterfeited, and if so, which one? Was the defendant aware that there was in fact something wrong with the check at the time that he cashed it? Was he aware at

the time of pleading of the elements of the crime with which he was charged? All that we have is the admission that the defendant in fact cashed the check. This is not in itself a crime. Especially, should the court have inquired into this aspect of the case when it became apparent that the defendant indicated that he felt that he had not been informed adequately of the consequences of his plea. At this point, the Court should have assured itself that there was evidence to support the defendant's guilt. This seemed to be the farthest from anyone's mind during the entire series of proceedings in this cause.

In addition, there is a clear indication that defendant was under the impression that the sentence which he was to receive was to be much less than that imposed by the Court. Yet, not once did the Court inquire into whether defendant had been made any promises in return for his plea of guilty. This was one of the main reasons for the promulgation of Rule 11. The record shows that the State's Attorney (not the Court) informed defendant that the maximum punishment for a violation of section 495 was 10 years in prison and/or a $1,000 fine, yet there was no inquiry into whether defendant had been promised that his sentence would in fact be much less than that. Obviously, defendant was of the opinion that just such a promise had been made, and some kind of "deal" had been arranged. This is not an involuntary plea, freely entered into because defendant thought that he was in fact guilty of the crime charged. Yet, when defendant brought this to the Court's attention, no attempt was made to explore this area. Rather, defendant was not even allowed to complete his statement. He was repeatedly cut off. Rather than exploring defendant's state of mind, the Court insisted upon holding him to a

plea which had been accepted improvidently in the first place. There was none of the inquiry which should have been made to determine what defendant had been told by his attorney, whether his attorney had explained the elements of the offense with which he was charged, from what source defendant had obtained his belief that his sentence would be limited to three months, or whether he had been promised leniency by the prosecutor in return for a guilty plea. There was not that scrupulous regard for the rights of defendant to which all men are entitled.

While there is some colloquy regarding the fact that defendant was also informed of the sentence to which he might be subjected, this also is absent from the record. From the record, it appears that the judge had become a mechanical robot concerned more with disposing of a case than with the rights of a human being. See Hoffman, "What Next in Federal Criminal Rules" 21 Wash & Lee L. Rev. 1, 8 (1964).

CONCLUSION.

The proceedings in this cause are replete with the kinds of actions which Rule 11 was designed to obviate. No inquiry was made into the defendant's state of mind at the time of the entry of the guilty plea. No effort was made to determine what his actions had been at the time in question, and whether they in fact consisted of a violation of the statute. No effort was made to determine whether he understood what he had been charged

with. No effort was made to determine whether he had been promised a "deal." In fact, defendant seems to have been an incidental participant in the entire proceedings. From all that appears he might just as well not have been present at all. There is no showing that the guilty plea, which could have taken no more than a minute, was either knowingly or voluntarily made. This is not enough upon which to require a defendant to spend three years of his life in prison. The sentence should be vacated and this cause remanded with directions to allow defendant to withdraw his plea of guilty.

As the Court of Appeals recognized in quoting from *Brady v. United States*, ... U.S. ....., 90 S. Ct. 1463, 1469 (1970), "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." This Court must make it clear that the requirements contained in Rule 11 concerning acceptance of guilty pleas are important and are not to be cast aside with the conclusionary statement that the defendant obviously was aware of what he was doing.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18040

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID LEE ZEZOFF,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

JUNE 17, 1970

Before SWYGERT, *Chief Judge*, PELL, *Circuit Judge*, and CAMPBELL, *Senior District Judge*.[1]

PELL, *Circuit Judge*. On May 9, 1968, defendant, David Lee Zezoff, was charged in a three count indictment, with uttering and publishing checks drawn upon the Treasurer of the United States with forged endorsements, with knowledge of the forgery, in violation of §495, Title 18, United States Code. Each count involved a different check. The three counts involved transactions allegedly at two different places.

Zezoff appeared for arraignment before the district court on May 22, 1968, at which time the assistant United States attorney advised the court in the defendant's presence, that the indictment was in three counts with each count carrying a penalty of $1000 and ten years.

[1] Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

Interrogation of the defendant developed the necessity for court-appointed counsel and the court appointed a member of the local bar who thereafter at all material times here involved did represent Zezoff. At the final arraignment on the same day, the assistant United States attorney, prior to the entering of a plea, again in the presence of Zezoff, stated that the charge was in three counts carrying a maximum penalty of $1000 and ten years. Following this statement, the district judge inquired of Zezoff if he understood that. The defendant replied in the affirmative. Thereafter, a not guilty plea was entered.

On February 18, 1969, trial having been set for February 20, 1969, the defendant, his counsel, and the assistant United States attorney appeared before the district judge at which time Zezoff's counsel indicated that the defendant was present for the purpose of changing his plea from not guilty to guilty as to count I only. At this juncture the assistant United States attorney apprised the defendant that on each of the three counts he faced a possible penalty of $1000 fine and/or ten years in jail and he understood that Zezoff's counsel had discussed that [the penalty] with Zezoff and had also discussed the matter of guilt with him.

The plea of not guilty was withdrawn and the court personally inquired of Zezoff whether he understood what the penalty was and whether knowing the penalty he desired to withdraw his plea of not guilty and enter a plea of guilty. To these inquiries, the defendant replied in the affirmative. Further interrogation by the court developed that Zezoff had not been compelled by anybody to do as he did, that he did it by himself freely and voluntarily without duress, that he was aware that he had a right to have his case tried before a jury and that he persisted in pleading guilty to count I of the indictment.

The court then accepted the plea of guilty following which the assistant United States attorney referred to witnesses who had identified Zezoff as having cashed the check involved in count I. On the entering of a guilty plea the government moved to dismiss counts II and III of the indictment, which counts were dismissed.

Zezoff and his counsel next appeared before the court on May 27, 1969, at which time the court stated to Zezoff that after studying the probation report, he was going to commit the defendant to the custody of the Attorney General of the United States, under §4208(b), Title 18, United States Code, for a period of ten years. The court further stated the defendant would be sent to an institution for study for a period of ninety days, at which time he would be returned to the court and the sentence would be corrected to suit the situation in accordance with the recommendation of the study. The court then inquired as to whether there was any reason as to why the sentence should not be pronounced immediately, to which Zezoff, *inter alia*, replied that he admitted his guilt.

On September 25, 1969 Zezoff and his counsel again appeared before the court, at which time the district judge referred to having received the study and recommendation and was reducing the sentence to three years. The United States attorney interjected that since the May 27 sentence was a tentative one the defendant should have the opportunity to offer anything in mitigation before sentence was pronounced. The court accordingly set the sentence aside following which there was an extended colloquy between the court, Zezoff, and his counsel, during which Zezoff contended that it was his understanding that he would only have to serve the three months. Zezoff admitted that the court had told him that the three months was for examination and that it would then be up to the court to either vacate the sentence, impose the sentence, or reduce the sentence. Zezoff further admitted that the court had on May 27, 1969 sentenced him to ten years. Zezoff's counsel stated that he had explained to Zezoff that he was "down there for ninety days of observation during which time the proper authorities would evaluate him, determine whether or not he was a fit subject for probation." Zezoff again claimed he had no knowledge of the ten year sentence. Subsequent discussion, however, further reflected that he was aware that the court had imposed on May 27, 1969 a sentence of ten years.

Zezoff's counsel stated he did not know what Zezoff was talking about.

The court then entered sentence of three years, that the period of imprisonment theretofore imposed be reduced to three years including time already served and that the defendant would become eligible for parole at such time as the Board of Parole might determine pursuant to §4208(a)(2), Title 18, United States Code.

During none of the colloquy did Zezoff deny guilt of count I of the indictment, his only contention being that he did not understand there would be any sentence beyond the three month study period as provided for in §4208(b), Title 18, United States Code. The record is silent as to whether there was any agreement or understanding with regard to the Government's moving to dismiss counts II and III in the event of a guilty plea as to count I.

Zezoff inquired about an appeal and the court, although recognizing that the dispute between Zezoff and his counsel would probably terminate the counsel's services, nevertheless instructed the counsel to file a notice of appeal. This was done.

It is probably significant at this point to observe that while Zezoff claimed that his understanding (and he was consistently vague) was that he had already served ninety days, there was never any reference whatsoever to the ninety days or three months at the time the not guilty plea was withdrawn and the guilty plea entered on February 18, 1969. The first reference to the so-called study period was more than three months later after the court had received the probation report which had been ordered on February 18, 1969.

There is some question in the record before us as to whether the defendant moved to withdraw his guilty plea in the court below. Failure to do so might well be dispositive of this appeal. However, the district judge at the time of final sentencing, at which time the defendant indicated a desire to appeal, did not advise the defendant of any necessity to move to withdraw his guilty plea and in fact notified the court-appointed counsel to file notice of appeal within ten days. Further, in a subsequent order of the district court denying bail pending appeal, reference was made to the defendant having made "a motion to set aside the sentence and his guilty plea" at the time of the final sentencing.

Inasmuch as there is some record support for the position that a motion to withdraw the guilty plea had been made, even though inartistically, we do not decide under the circumstances of this particular case that a motion to withdraw the guilty plea pursuant to Rule 32 of the Federal Rules of Criminal Procedure was or was not made, or was or was not necessary, but instead turn our consideration to the merits of this appeal.

In his appeal Zezoff appears principally to rely on *McCarthy* v. *United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). The plea of guilty in the case before us, however, was entered on February 18, 1969 and the decision date of *McCarthy* was April 2, 1969. The Supreme Court, in a *per curiam* decision, more than a month after the decision in *McCarthy*, expressly held that *McCarthy* would not be applied retroactively to guilty pleas which had been entered prior to the decision date of *McCarthy*. *Halliday* v. *United States*, 394 U.S. 831 (1969).

The court in *Halliday* recognized that the guidelines handed down in *McCarthy* had been previously followed by only one circuit; that over eighty-five percent of all convictions in the federal courts are obtained pursuant to guilty pleas and that prior to Rule 11's recent amendment of the Federal Rules of Criminal Procedure not all district judges personally questioned defendants before accepting their guilty pleas. The court recognized that there had been a large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11 and held "that only those defendants whose guilty pleas were accepted after April 2, 1969 are entitled to plead anew if their pleas were accepted without full compliance with Rule 11." (Page 833).

Zezoff also relies on the still more recent case of *Boykin* v. *Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969) which involved a guilty plea in a state court. The *Boykin* case reflected that the judge asked no questions whatsoever of petitioner concerning his plea and the petitioner did not address the court. This is not the situation in the case before us in which we do not have a record on which to base a determination of the voluntariness of the guilty plea.

Zezoff, while not denying the non-retroactivity of *McCarthy*, further contends that *Smith* v. *United States*, 360 U.S. 1, 79 S. Ct. 991, 3 L. Ed. 2d 1040 (1951) also requires a reversal. There are some significant factors, however, in *Smith* v. *United States*, *supra* which are not present in the case before us. In *Smith*, prior to the entry of the plea of guilty, the Government agent, who had previously interviewed the petitioner, had a private, out-of-court audience with the district judge in his chambers at which time he discussed, in the absence of the defendant, the contemplated proceedings and reported on the alleged crimes of the petitioner. The court of appeals, it is to be noted, found that the judge's mind had become thoroughly conditioned by the interview and the disclosures made to him. In *Smith* the petitioner not only entered a guilty plea but stated he did not wish counsel, that he was willing to waive indictment and be prosecuted under an information. The information was immediately filed, counsel and venue was waived and there was an immediate plea of guilty to the information. Sentence was passed promptly. The precise question before the court in the *Smith* case was whether the petitioner's alleged violation of the kidnapping act had to be prosecuted by an indictment. The court held that it did and the waiver made by petitioners was not binding. The case was disposed of on the indictment point and the court found it unnecessary to reach due process questions presented. Precipitous and telescoped proceedings were involved in *Smith*, which are not involved here and the *Smith* facts have no particular analogy to the proceedings in the case before us.

Notwithstanding our finding that the cases on which Zezoff relies are not persuasive here, we do not dispose of the pending assertions by Zezoff of a violation of his constitutional rights without a consideration of Rule 11 of the Federal Rules of the Criminal Procedure which was in effect at the time of the guilty plea. Basically, our inquiry is directed toward a determination of whether the plea was voluntarily and knowingly made. Again, we note that there is no apparent assertion by Zezoff that he was not guilty of the crime charged. In *McCarthy*, there was an alleged violation of the Internal Revenue code involving a "knowing and willful" attempt

to defraud the Government. However, McCarthy and his counsel during the sentencing hearing, although pleading guilty, denied willfulness and knowledge, which remarks according to the court indicated a lack of full awareness of the nature of the charge.

The matter of guilty pleas was again before the Supreme Court in the recent case of *Brady* v. *United States*, 38 LW 4366, (May 4, 1970): In *Brady*, it is true that at the time the plea was made Rule 11 did not contain the provisions requiring the court to address the defendant personally and to determine that he understood the consequences of his pleading. However, even prior to the 1966 amendment of Rule 11, there was a requirement (which was in effect at the time of the *Brady* plea) that the court should not accept a plea without first determining that the plea was made voluntarily with understanding of the nature of the charge.

The *Brady* court recognizes, as we do, that a guilty plea is a grave and solemn act to be accepted only with care and discernment because of the constitutional issues involved. As the court states:

> "Waivers of constitutional right not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Page 4368)

A review of the record of the cause before us convinces us that Zezoff's plea meets the above standard in which we are fortified by the general discussion of the subject in the *Brady* case, *supra*. Without reviewing the *Brady* decision in detail suffice it to say that due recognition is given not only to the importance of the protection of constitutional rights in connection with guilty pleas but also to the very significant place occupied by knowledgeable, voluntary guilty pleas in the overall picture of criminal jurisprudence.

Finding from the above record that the defendant's plea was voluntary with understanding of the nature of the charge and the consequences of the plea, although not finding whether the proceedings fully complied with the *McCarthy* guidelines, the same not being here appli-

cable, we find that the defendant's constitutional rights were not violated during the proceeding involving his guilty plea.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.